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Jorge Crespo Gomez v Public Prosecutor

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FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–179–08 OF 2017 (B)
ROHANA YUSUF PCA, AZAHAR MOHAMED CJ (MALAYA), ABANG ISKANDAR CJ (SABAH AND SARAWAK), NALLINI PATHMANATHAN, VERNON ONG, ABDUL RAHMAN SEBLI, ZALEHA YUSOF, ZABARIAH YUSOF AND HASNAH HASHIM FCJJ
13 AUGUST 2020

C

Criminal Procedure — Drug Trafficking — Presumptions of possession and trafficking under Dangerous Drugs Act 1952 ('the DDA') — Trial judge failed to make finding as to which presumption under the DDA he relied upon to find accused guilty — Whether trial judge's discussion in judgment of both the statutory presumptions of possession and trafficking in addition to evidence of actual possession and trafficking created doubt as to basis of the conviction — Whether accused prejudiced by trial judge's failure to elect — Whether accused's conviction for trafficking had to be substituted with one for possession

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The appellant, a Peruvian, was sentenced to death by the High Court after being found guilty of trafficking in 779g of cocaine which was found in a bag he was carrying at the Kuala Lumpur International Airport shortly after he arrived there from Dubai. The cocaine was found within sealed metal cylinders which were amongst several automobile spare parts and other personal effects in the bag. At his trial for trafficking, the appellant denied knowledge of the cocaine saying someone named 'Soloman' had asked him to deliver the car spare parts to an unidentified person in Thailand in return for a fee of USD1,000. The appellant's defence was that he was an innocent carrier. The trial judge found the defence to be a bare denial of the charge and an afterthought since it was never raised during the prosecution's case. Given that the appellant had not given police any details about Soloman, the trial judge ruled that in all probability it was a concoction and convicted the appellant after finding that the prosecution had proved its case beyond reasonable doubt. In his appeal to the Court of Appeal ('COA') against the conviction and sentence, the appellant had, inter alia, complained that the trial judge seemed to have invoked both the presumptions of possession and of trafficking against him under, respectively, ss 37(d) and 37(da) of the Dangerous Drugs Act 1952 ('the DDA') which was not allowed in law. In dismissing the appeal, the COA held that the trial judge did not breach the rule against double presumptions and that although the judge had discussed the applicability of both those presumptions, he had in fact only invoked the statutory presumption of trafficking against the appellant. The appellant relied upon the same ground in

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his instant appeal against the conviction and sentence.

Held, unanimously setting aside the conviction and sentence for trafficking, convicting the appellant under s 12(2) of the DDA and sentencing him to ten years' jail:

(1) The issue in the instant appeal was not whether the trial judge had invoked double presumptions under the DDA against the appellant but his failure to make a finding of which presumption he had relied on to convict the appellant, ie, did he rely on presumed possession or actual possession and actual trafficking or presumed trafficking. Reading the trial judge's grounds of judgment, the judge did not make an election as to which presumption he had relied on. He had adverted to both the statutory presumptions and also to s 2 of the DDA without making a finding as to whether the appellant was found to be in actual possession and presumed to be trafficking under s 37(da) or whether the appellant was presumed to be in possession of the drugs under s 37(d) and found to be trafficking under s 2 of the DDA. It was imperative that the trial judge made an election as it impacted the burden that was placed upon the defence to rebut the presumption (see paras 23–24 & 26).

(2) By invoking all the alternative presumptions available, the appellant would have had to rebut all the presumptions (alternative ones included) and that was a heavy burden on him as the standard of proof to rebut a presumption was on a balance of probabilities. But if a trial court had acted on the available evidence to prove the relevant ingredients without resorting to presumptions, an accused would only have an evidential burden to raise a reasonable doubt. The heavier burden on the appellant could have been avoided if the trial judge had made a definite finding on precisely which presumption the appellant had to rebut. The trial judge's failure in this regard was most undesirable and amounted to a misdirection by way of a non-direction (see paras 27–28).

(3) There was overwhelming evidence that the appellant had possession of the impugned drugs. He had custody and control of the bag (P13) and its contents. P13 bore a baggage tag in the appellant's name and it tallied with a baggage claim tag that was found in the appellant's possession. The drugs were concealed in metal cylinders which were sealed by welding and the cylinders were placed together with other motor spare parts in the bag to give the impression to anyone who checked P13 that the cylinders were part of the motor spare parts. It could be inferred that the appellant was conscious of and knew what was in the bag and the metal cylinders (see paras 30–31).

(4) With regard to the defence of innocent carrier, the courts below correctly found that the circumstances under which P13 was given to the appellant would have raised the suspicions of any reasonable person and would

have put him to inquiry as to the legitimacy of the transaction. The courts below rightly found that the appellant's failure to make any inquiries gave the inference that he knew the metal cylinders contained the impugned drugs (see paras 35–36).

[Bahasa Malaysia summary

Perayu, seorang warganegara Peru, telah dijatuhkan hukuman mati oleh Mahkamah Tinggi setelah didapati bersalah mengedar 779g kokain yang dijumpai di dalam beg yang dibawanya di Lapangan Terbang Antarabangsa Kuala Lumpur sejurus setelah beliau tiba dari Dubai. Kokain tersebut dijumpai di dalam silinder logam ditutup di antara beberapa alat ganti kenderaan dan barang peribadi lain di dalam beg tersebut. Semasa perbicaraan pengedaran dadah beliau, perayu menafikan pengetahuan kokain dengan mengatakan bahawa seseorang bernama 'Soloman' telah meminta beliau untuk menyerahkan alat ganti kereta kepada orang yang tidak dikenali di Thailand dengan bayaran USD1,000. Pembelaan perayu adalah bahawa beliau adalah pembawa yang tidak bersalah. Hakim perbicaraan mendapati pembelaannya sebagai penafian kosong terhadap pertuduhan dan pemikiran semula kerana ianya tidak pernah dibangkitkan semasa kes pendakwaan. Memandangkan perayu tidak pernah memberikan perincian kepada polis mengenai Soloman, hakim perbicaraan memutuskan bahawa berkemungkinan besar ianya adalah rekaan dan menyabitkan perayu setelah mendapati bahawa pihak pendakwaan telah membuktikan kesnya tanpa keraguan yang munasabah. Dalam rayuannya ke Mahkamah Rayuan ('MR') terhadap sabitan dan hukuman tersebut, perayu telah, antara lain, membuat hujahan bahawa hakim perbicaraan seperti telah mengguna pakai kedua-dua anggapan pemilikan dan pengedaran terhadap beliau, masing-masing di bawah, ss 37(d) dan 37(da) Akta Dadah Berbahaya 1952 ('ADB') yang tidak dibenarkan dalam undang-undang. Dalam menolak rayuan tersebut, MR memutuskan bahawa hakim perbicaraan tidak melanggar peraturan terhadap anggapan berganda dan bahawa walaupun hakim telah membicarakan penggunaan kedua-dua anggapan tersebut, beliau sebenarnya hanya mengguna pakai anggapan undang-undang pengedaran terhadap perayu. Perayu bergantung pada alasan yang sama dalam rayuan semasa terhadap sabitan dan hukuman tersebut.

Diputuskan, sebulat suara mengetepikan sabitan dan hukuman terhadap pengedaran, dengan menjatuhkan hukuman ke atas perayu di bawah s 12(2) ADB dan menjatuhkan hukuman penjara sepuluh tahun kepada beliau:

(1) Isu dalam rayuan semasa bukanlah sama ada hakim perbicaraan telah mengguna pakai anggapan berganda di bawah ADB terhadap perayu tetapi kegagalan beliau untuk membuat dapatan tentang anggapan yang telah beliau guna pakai untuk menghukum perayu, iaitu, adakah beliau bergantung pada anggapan pemilikan atau pemilikan sebenar dan pengedaran sebenar atau anggapan pengedaran. Membaca alasan

penghakiman hakim perbicaraan, hakim tersebut tidak membuat pilihan mengenai anggapan yang beliau gunakan. Beliau telah bergantung kepada kedua-dua anggapan undang-undang dan juga s 2 ADB tanpa membuat dapatan mengenai sama ada perayu didapati berada dalam pemilikan sebenar dan anggapan terhadap pengedaran di bawah s 37(da) atau sama ada perayu dianggap memiliki dadah di bawah s 37(d) dan didapati mengedar di bawah s 2 ADB. Adalah mustahak bagi hakim perbicaraan untuk membuat pilihan kerana ianya mempengaruhi beban terhadap pihak pembelaan untuk menyangkal anggapan tersebut (lihat perenggan 23–24 & 26).

(2) Dengan mengguna pakai semua anggapan alternatif yang ada, perayu harus membuat bantahan terhadap semua anggapan (termasuk yang alternatif) dan ianya merupakan beban yang berat terhadap beliau kerana beban pembuktian untuk menolak anggapan tersebut adalah berdasarkan imbangan kebarangkalian. Tetapi sekiranya mahkamah perbicaraan telah bertindak berdasarkan keterangan yang ada untuk membuktikan nas-nas yang relevan tanpa bergantung anggapan, seorang tertuduh hanya akan memiliki beban pembuktian untuk menimbulkan keraguan munasabah. Beban yang lebih berat bagi perayu dapat dielakkan sekiranya hakim perbicraan telah membuat dapatan yang kukuh mengenai anggapan dengan tepat yang harus disangkal oleh perayu. Kegagalan hakim perbicaraan dalam hal ini adalah tidak wajar dan dianggap sebagai salah arah dengan cara yang tidak tepat (lihat perenggan 27–28).

(3) Terdapat banyak bukti bahwa perayu mempunyai pemilikan terhadap dadah tersebut. Beliau mempunyai jagaan dan kawalan beg (P13) dan kandungannya. P13 mempunyai label bagasi atas nama perayu dan ianya bersamaan dengan label tag bagasi yang terdapat dalam simpanan perayu. Dadah tersebut disembunyikan dalam silinder logam yang ditutup dengan kimpalan dan silinder tersebut diletakkan bersama dengan alat ganti motor lain di dalam beg untuk memberi anggapan kepada sesiapa pun yang memeriksa P13 bahawa silinder itu adalah sebahagian dari alat ganti motor. Ianya dapat disimpulkan bahawa perayu menyedari dan mengetahui apa yang ada di dalam beg dan silinder logam (lihat perenggan 30–31).

(4) Berkenaan dengan pembelaan pembawa yang tidak bersalah, mahkamah bawahan telah dengan tepat membuat dapatan bahawa keadaan di mana P13 diberikan kepada perayu akan menimbulkan kecurigaan terhadap mana-mana orang yang munasabah dan akan membuatnya membuat pertanyaan mengenai kesahihan transaksi tersebut. Mahkamah bawahan dengan tepat mendapati bahawa kegagalan perayu untuk membuat sebarang pertanyaan memberikan kesimpulan bahawa beliau tahu

bahawa silinder logam itu mengandungi dadah (lihat perenggan 35–36).] A

Cases referred to

Hoh Bon Tong v PP [2010] MLJU 2184; [2010] 5 CLJ 240, CA (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273, FC (distd) B
PP v Badrulsham bin Baharom [1988] 2 MLJ 585 (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705; [2000] 4 CLJ 649, HC (refd)
Raman a/l Kunjiraman v PP [2018] supp MLJ 86; [2014] 9 CLJ 915, FC (distd)
Seyedalireza Seyedhedayatollah Ehteshamiardestani v PP [2014] 6 MLJ 408, CA (refd) C
Teng Howe Sing v PP [2009] 3 MLJ 46; [2009] 3 CLJ 733, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 12(2), 37(d), (da), (da)(ix), 39A(2), 39B, 39B(1)(a) D

Appeal from: Criminal Appeal No B-05(M)-260–06 of 2016 (Court of Appeal, Putrajaya) E

Gopal Sri Ram (Hisyam Abdullah, Abdul Rashid Ismail, Yasmeen Soh Sha Nisse, Karluis Quek, Azreen Ahmad Rastom, Siti Nurani Md Zahidi and Mohd Nor Hafidzuddin Yusoff with him) (Rashid Zulkifli) for the appellant.
Nik Suhaimi Nik Sulaiman (Umar Saifuddin Jaafar, Mangaikarasi Krishnan, Faizah Salleh, Ku Hayati Ku Haron and Asmah Musa, Muhammad Azmi Mashud with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent. F

Zabariah Yusof FCJ (delivering judgment of the court): G

[1] This constitutes the judgment of the unanimous decision of this court. The appellant, a Peruvian national was convicted for the offence of trafficking in dangerous drugs and sentenced to death by the High Court, which was subsequently affirmed by the Court of Appeal on the following charge: H

> That you on 26 February 2013, at about 3.30 pm, at International Arrival Hall, Carousel F Level 3, MTB Kuala Lumpur International Airport, in the district of Sepang, in the state of Selangor, did traffic in dangerous drugs to wit 779 grams of Cocaine, and thereby committed an offence under section 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under section 39B(2) of the same Act. I

[2] The appellant appealed to the Federal Court, which is the appeal before us against the conviction and the death sentence imposed. At the same time the appellant also raised the issue of the constitutionality of the imposition of the

death sentence. This judgment deals with the conviction and sentence issue only. The constitutionality issue on the death penalty is being dealt with in a separate judgment by my learned brother and sister judges, Azahar Mohamed CJM and Nallini Pathmanathan FCJ.

BACKGROUND

[3] The appellant was arrested by police at the Kuala Lumpur International Airport when he was seen carrying his luggage containing car spare parts including metal cylinders from which six packets of dangerous drugs were found.

[4] The luggage bore a tag with his name on it and it tallied with the baggage claim which was found in the appellant's possession.

[5] Apart from the car spare parts and cylinders, undergarments and toiletries were also found in the luggage, which were subsequently sent for DNA analysis. A DNA profile was successfully obtained from a toothbrush and it matched with the appellant's DNA sample obtained from blood specimen. The clothes were tried on the appellant and it fitted him.

[6] At the end of the prosecution's case the learned judicial commissioner ('JC') held that the prosecution had proven a prima facie case against the appellant.

[7] The case for the appellant was that he came from Caracas, Venezuela to Panama City and from Panama City to Sao Paulo, Brazil. From Brazil he went to Dubai and finally to Kuala Lumpur. From Kuala Lumpur the appellant had planned to take a bus to Thailand as he was instructed by one Soloman to send the car spare parts to someone yet to be identified in Thailand. Upon completion of the task he would be paid USD1,000. The appellant claimed no knowledge of the drugs in the metal cylinders found in the luggage bag. The appellant also claimed that he did not see how the metal cylinders were cut by the police as he only saw them after they were already cut into two pieces.

[8] The appellant pleaded the defence of innocent carrier.

[9] The appellant also gave a statement which was marked through the investigating officer, PW6 as exh D66, to support his oral testimony in court.

FINDINGS BY THE HIGH COURT

[10] The learned JC rejected the defence of the appellant of innocent carrier. His Lordship held that the defence is a bare denial of his knowledge and the existence of the drugs in the metal cylinders.

[11] The defence was also held to be an afterthought as the appellant's version of events was never put during the prosecution's case.

[12] Soloman's existence was held to be in doubt and in all probability it was a concoction of the appellant as there were no details or description given by the appellant to the police save for the evidence that it was Soloman who had requested him to send the car spare parts to Thailand after which he would be paid.

[13] The learned JC held that the prosecution had succeeded in proving its case beyond reasonable doubt. The appellant was found guilty and convicted as charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') and was sentenced to death by hanging.

[14] The appellant subsequently appealed to the Court of Appeal.

FINDINGS BY THE COURT OF APPEAL

[15] At the Court of Appeal the following were canvassed by the appellant:

(i) the learned JC had erred in handling of the presumptions under the DDA, namely no election as to which presumption was invoked by the learned JC;

(ii) the learned JC had misdirected himself when he failed to draw an adverse inference in favour of the appellant arising from the investigating officer's failure to investigate crucial elements of the case;

(iii) the appellant was not provided with adequate interpreter; and

(iv) the constitutionality of the death sentence imposed by s 39B of the DDA.

However, before us, counsel for the appellant asserted that he would be addressing the issue in para (i) only.

[16] The Court of Appeal found that although the learned JC had alluded to the applicability of both presumptions of possession and trafficking under ss 37(d) and 37(da) of the DDA, His Lordship had done so only in the alternative and finally he found that there was mens rea possession and applied

A the presumption under s 37(da)(ix) of the DDA. This can be gleaned from the grounds of judgment of the Court of Appeal, which we reproduced for convenience:

> [38] There can be no doubt that there were alternative findings made by the learned Judge in respect of the application of the presumptions relating to possession and trafficking vis a vis mens rea (direct) possession and direct trafficking.
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> [39] However, having scrutinised the learned Judge's grounds of judgment in its entirety, we opined that the learned Judge had indeed found that the prosecution had proved that the appellant was having mens rea possession of the said drugs (as stated in his grounds of judgment in para 24) and had trafficked in the said drugs by virtue of the invocation of the presumption of trafficking under s 37(da)(ix) of the DDA in view of the weight of the said drugs in his possession (as stated in para 26).

[17] The Court of Appeal at para 42 of its grounds said that mens rea possession is the main thrust of the learned trial JC's finding in respect of possession of the said drugs. Such findings were said to be apparent from the fact that the learned JC had dealt at great length upon the factors that he had taken into account to pin down the appellant with mens rea possession of the drugs. The factors are as stated in paras 19–23 of Vol 2 *RR* which reads as follows:

> 19. Based on the evidence given by PW 5, the accused was caught red handed with the luggage bag P13 which he was carrying in the arrival hall of KLIA. On the handle of P13 was a check (sic) in bag tag bearing the name of the accused. PW65 had reported in his police report P42 that P13 had a tag number EK 214465 in the accused's name. The presence of the said bag tag on P13 was also confirmed by PW6 and by photograph number 3 of P5 (1–27). According to PW6's investigation, the accused had flown on Emirates Airlines from Sao Paulo, Brazil and arrived at KLIA on 26.2.2013. In P13, three boxes P35, P37 and P 39 were found with other personal items of the accused.
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> 20. In P35, P37 and P39 were metal cylinders containing the impugned drugs. There was also a tooth brush (P19A) found in P13 which was sent [to] PW 3 Mohd Izuan bin Othman, a government chemist for DNA analysis. PW 3 analysed the DNA present in P19A and compared it with the DNA of the accused blood (1 tube P18A) made the finding that the two DNA matched. PW 3's DNA report was marked as P17.
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> 21. Hence, based on the above stated facts, the accused had custody and control of P13 and the contents in P13. The accused also had knowledge of the contents in P13.
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> 22. Next, since the impugned drugs were carefully concealed and hidden in the metal cylinders which were welded completely, and could not be seen with the naked eyes except by using a cutter to cut them into pieces to discover the impugned drugs inside them, it is my considered view that this court can infer that the accused had knowledge of the impugned drugs in the metal cylinders.
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> 23. Furthermore, the boxes that contained the metal cylinders were placed in P13 together with motor belts (P59 (1–6), gaskets (motor parts) (P60 (1–3)) and rubber

rolls (P61 (1–11)) to give an impression to anyone who is authorised to check the contents of P13 that the boxes with metal cylinders were part of the motor spare parts that the accused carry in P13. This fact further proved that the accused was conscious of the impugned drugs in the metal cylinders and tried to camouflaged them as motor parts.

24. Having proven custody, control and knowledge of the impugned drugs in P13 against the accused, the prosecution had proven that the accused had possession of the impugned drugs.

[18] The Court of Appeal also said at para 42 of its judgment that 'Equally the invocation of the presumption of trafficking under s 37(da)(ix) of the DDA is the main thrust of the learned JC's finding in respect of the element of trafficking in the said drugs based upon the fact that the learned JC had taken into account the amount of drugs in the possession of the appellant which exceeded the statutory limit of 40g as prescribed by the said section'.

[19] The Court of Appeal is of the view that:

[45] ... The learned trial judge did not at any time breach the rule against double presumptions by taking into consideration the various alternatives available to him in determining the manner in which the twin elements of possession and trafficking in the said drugs are proven. No one is confused as in the final analysis the learned trial judge, as here, had only made one finding relating to possession of the said drugs, to wit, the appellant was found to have mens rea possession of the said drugs under s 37(da)(ix) of the DDA on account of the weight/amount of the said drugs found in his possession.

[20] The Court of Appeal referred to this court's decision in *Raman a/l Kunjiraman v Public Prosecutor* [2018] supp MLJ 86; [2014] 9 CLJ 915 which is purportedly on point:

[30] A careful reading of the judgment of the learned trial judge reveals that the learned judge was fully aware of the danger of breaching the rule of double presumption when he said in no uncertain term that 'The invocation of s 37(d) preluded (sic) the invocation of s 37(da)'. Furthermore, the ratio in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273; [1998] 2 CLJ 170 in effect, only says that, one cannot rely on the presumption of possession under s 37(d) of the Act to invoke a further presumption of trafficking under s 37(da) of the Act. In other words, *Muhammad Hassan* only prohibits the use of double presumptions under ss 37(d) and 37(da) of the Act. Contrary to the argument of counsel, there is nothing to prevent the learned trial judge from analysing all the alternatives available to him under the Act. The learned trial Judge has not breached the rule of double presumptions by taking into consideration the various alternatives in the reservoir of choices or alternatives available to him to determine culpability of the appellant. Judges may expatiate on the various alternatives available without the need to incur the obloquy of counsel.

A [31] We observe that the learned judge was considering those alternatives when he considered whether to invoke the presumption under s 37(d) or alternatively under s 37(da) of the Act. There was nothing in the ground of judgment to show that the learned trial judge fell into error by invoking both ss 37(d) and 37(da) as envisaged in *Muhammad Hassan* (supra). We are satisfied that the application of legal B principles to the facts of this case had sufficiently been appreciated, applied and well ascertained by the learned trial judge.

[21] The Court of Appeal found that there was no double presumption invoked by the learned JC. His Lordship was merely considering the various C alternatives available to him in determining the manner in which the twin elements of possession and trafficking in the said drugs are proven. It was only for the sake of completeness that the learned JC 'had ventured to discuss the alternative findings of the application of both the presumptions of possession and trafficking which we think is completely unnecessary, bordering on D verbosity'. The Court of Appeal found that the learned JC had only made one finding relating to possession of the said drugs, to wit, the appellant was found to have mens rea possession of the said drugs and presumed to be trafficking in the said drugs under s 37(da)(ix) of the DDA on account of the weight/amount of the said drugs found in his possession.

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[22] Given the circumstances, the Court of Appeal found that the conviction of the appellant is safe. The appeal by the appellant was dismissed and the conviction affirmed.

F OUR FINDINGS

[23] The concern here is not the invocation of the double presumptions, namely invocation of s 37(d) of the DDA to invoke a further presumption under s 37(da) of the DDA. Clearly this is prohibited under *Muhammed bin* G *Hassan v Public Prosecutor* [1998] 2 MLJ 273 at pp 274–275. That is not the case here. The concern here is the failure of the learned JC in making a finding of which presumption was he relying on, ie did he rely on presumed possession or actual possession or did he relying on actual trafficking or presumed trafficking. A reading of the grounds of judgment of the learned JC disclosed H the following under the heading 'possession' where he said:

[24] Having proven custody, control and knowledge of the impugned drugs in P13 against the accused, the prosecution had proven that the accused had possession of the impugned drugs.

I [25] *In the alternative*, the prosecution had also utilised the presumption of knowledge under section 37(d) DDA against the accused who was found to have had in custody or under his control P13 containing dangerous drugs in the metal cylinders. Therefore, the accused was until the contrary is proved, shall be deemed to have been in possession and to have known the nature of such drugs. With the aid of this presumption, the prosecution had proven that the accused had possession of

the impugned drugs and knew the nature of such drug.

TRAFFICKING

[26] As the prosecution had proven direct or mens rea possession of the impugned drugs against the accused, and since the amount of the drugs exceeded the statutory limit of 40 grammes of cocaine under section 37(da)(ix) DDA, until the contrary is proved, the accused shall be presumed to be trafficking in the said drug.

[27] *Even without utilising* section 37(da) DDA *presumption*, the prosecution having proven positive or mens rea possession, was able to prove that the accused was carrying, transporting the impugned drugs which is trafficking as defined under section 2 DDA. In the instant case, the accused was carrying or transporting the impugned drugs in P13 from Sao Paulo Brazil to KLIA, Malaysia which was an overt act on the part of the accused.

[28] *In the alternative*, since the prosecution had proven that the accused has in his custody or control of P13 which contained the impugned drugs, the presumption that the accused was deemed to have been in possession of such drug and to have known the nature of such drug under section 37(d) DDA was invoked. With that one presumption only, the prosecution is able to resort to section 2 DDA to prove direct trafficking of carrying or transporting the impugned drugs. (Emphasis added.)

His Lordship's finding at para 53 states:

[53] *In addition* this court had decided that *the statutory presumption under* section 37(da) of the Dangerous Drugs Act 1952 of trafficking had arisen against the accused as the weight of the drugs in this case had exceeded the statutory minimum amount where the prosecution had proven positive possession, the burden of rebutting the statutory presumption by the accused persons is on a balance of probabilities ...

[54] *Further in the alternative*, since section 37(d) DDA applied in the second situation, the Defence also bears the same burden to rebut the statutory presumption on the same standard proof. (Emphasis added.)

If one is to read paras 24–28 and 53–54 of the grounds of judgment of the learned JC, as we had reproduced in the preceding paragraph of this judgment, the learned JC made findings as follows:

(a) mens rea possession by direct evidence and presumption under s 37(da) of the DDA; or alternatively

(b) presumption under s 37(d) of the DDA for possession and knowledge and definition of 'trafficking' under s 2.

[24] The aforesaid disclosed that His Lordship did not make an election as to which presumption he had relied on. He had adverted to both presumptions under ss 37(d) and 37(da) of the DDA and also s 2 without making a finding as to whether the appellant was found to be in actual possession or was presumed to be trafficking under s 37(da) of the DDA or whether the appellant

was presumed to be in possession of the drugs under s 37(d) of the DDA and was found to be trafficking under s 2 of the Act.

[25] In *Seyedalireza Seyedhedayatollah Ehteshamiardestani v Public Prosecutor* [2014] 6 MLJ 408 a decision by the Court of Appeal which was affirmed by this court in Mahkamah Persekutuan Rayuan Jenayah 05–53–03, held that if the learned judge had resorted to the presumption in calling the defence, the law requires that the learned JC apply the test of balance of probabilities in considering whether the appellant had rebutted the presumption.

[26] It is imperative that the learned JC made his election as to which presumption he was relying on, namely whether it was actual possession based on the evidence before him or presumed possession under s 37(d) of the DDA and whether it was actual trafficking based on the evidence or presumed trafficking under s 37(da) of the DDA, as such finding had an impact on the burden placed on the defence.

[27] Hence, by invoking all the alternative presumptions available, it would have an effect that the appellant would have to rebut all the presumptions (alternative ones included) that had been invoked against him. That would be a heavy burden on the appellant as the standard of proof to rebut a presumption is on a balance of probabilities. If the court had acted on the available evidence in proof of the relevant ingredients without resorting to presumptions there is only an evidential burden on an accused person to raise a reasonable doubt. All these could have been avoided if only the learned judge made a definite finding on which presumption precisely that the appellant has to rebut. In this regard, the view by Augustine Paul J in *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649 is relevant:

> It must be observed that reliance on the presumption provisions where there is available evidence of the facts presumed will be unfavourable to the accused. This is because where the court relies on a statutory provision relating to presumption of law like the presumption provisions it is bound to take the facts as proved until evidence to the contrary is given, on a balance of probabilities, to disprove it (see *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 69; *Nagappan Kuppusamy v Public Prosecutor* [1968] 2 MLJ 53). This results in a legal burden being imposed on an accused person though it is not illegal. Failure to discharge the burden, even where a reasonable doubt as to guilt exists, will be followed by conviction (see *State v Mello & Another* [199] 1 LRC 215). However, if the court had acted on the available evidence in proof of the relevant ingredients without resorting to presumptions there is only an evidential burden on an accused person to raise a reasonable doubt. This indiscriminate use of presumptions when there is evidence of the facts to be presumed will be unfavourable to the accused as it will place a heavier burden on him which could have been avoided. Fairness to the accused therefore demands that

the presumption provisions are used only when there is no evidence of the facts to be presumed. A

[28] The approach by the learned JC in not electing or making a finding as to which presumption he relied on for possession and trafficking but by merely relying on alternatives was most undesirable. This amounts to a misdirection by way of non direction on the part of the learned JC. B

[29] The prosecution and the Court of Appeal relied on *Raman a/l Kunjiraman* to state that there is nothing wrong to state the various alternative presumptions that are available. That we agree, however, there must be specific finding as to which particular presumption the court is invoking to pin on the accused person, as that would have a bearing on the burden that the appellant would have to discharge when adducing his defence. In *Raman a/l Kunjiraman* there was a definite finding of which presumption was applied by the court, unlike the present case where there was no finding made by the learned JC. C D

[30] Be that as it may, we found that there is overwhelming evidence of possession of the impugned drugs by the appellant. The appellant had custody and control of the bag P13 and the contents of P13. P13 bore a baggage tag in the name of the appellant and it tallied with the baggage claim tag which was found in the appellant's possession. E

[31] There is evidence that the drugs were carefully concealed and hidden in metal cylinders which were welded, and these were found in P13. The police had to cut the metal cylinders to discover the impugned drugs. The cylinders were placed together with motor spare parts, motor gaskets and motor rolls to give an impression to anyone who checked the contents of P13 that the boxes of metal cylinders were part of the motor spare parts that the appellant carried in P13. It can be inferred that the appellant was conscious and knew what was in the bag and the metal cylinders. F G

[32] It was alleged by the appellant that the investigations by SP6, the investigating officer left much to be desired. SP6 failed to investigate the handphone of the appellant which consisted of the handphone numbers of his contacts prior to his arrest. H

[33] Although the investigation was not top notch, the Court of Appeal found that the *Alcontara* notice given by the appellant was faulty as it was given ten days after his arrest. It is the appellant's case that his alcontara notice was consistent with his cautioned statement, D66 (*Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585, *Teng Howe Sing v Public Prosecutor* [2009] 3 MLJ 46; [2009] 3 CLJ 733). It is submitted that the appellant had given his alcontara notice at the first opportunity wherein he stated that he had no I

knowledge of the drugs and that it was given to him by the real trafficker who was his friend, Solomon. The appellant said that he would eventually travel to Thailand to hand over those items.

[34] The Court of Appeal had considered the alcontara notice and the issue raised by the appellant on the lack lustre investigation by the investigating officer, and held that the disclosure of the information in the *Alcontara* notice was insufficient. The *Alcontara* notice did not contain sufficient information or details as to who was the recipient of the contents of the bag. Only Solomon's name was mentioned in the appellant's cautioned statement. No other details were provided on Solomon by the appellant. In the absence of any details on Solomon, it would be an uphill task for the investigating officer to investigate on Solomon. It is also not known as to whom, the appellant was supposed to hand over the spare parts items.

[35] On the absence of knowledge on the part of the appellant, on the contents of P13 and the defence of innocent carrier, we found that the learned JC and the Court of Appeal had considered the circumstances in which P13 was given to the appellant which should have raised suspicion for a reasonable person to be put on an inquiry as to the legitimacy of such a transaction. The appellant said that the spare parts in P13 was supposed to be delivered to Thailand. For that he was promised USD1,000 together with all expenses paid for his stay in Caracas and for the multiple flight tickets to land in Malaysia. All these trouble just to carry the six metal cylinders to Thailand. One would wonder why all that trouble just to deliver it to Solomon in Thailand when the items could have easily been sent from Caracas direct to Thailand by courier without the necessity of asking the appellant to do it and incurring expenses. Why the stop in Malaysia?

[36] As the circumstances are such as to arouse suspicion, it is incumbent on the part of the appellant to make the necessary inquiries to satisfy himself as to the genuineness of the transaction. There was concurrent findings by the learned JC and the Court of Appeal that the only inference that can be deduced from the suspicious circumstances which was not queried by the appellant, is that the appellant knew what he was carrying in the metal cylinders were drugs. The failure to make inquiries from Solomon as to why the need to personally sent the items via Malaysia en route to Thailand, the appellant is deemed to know and that the appellant was guilty of wilful blindness. The appellant had all the opportunity to enquire and to check the bag, but did not do so as he was shutting his eye to the obvious (see *Hoh Bon Tong v Public Prosecutor* [2010] MLJU 2184; [2010] 5 CLJ 240). In the course of the law he is taken to know.

[37] Therefore in such circumstances, the alcontara notice purportedly issued by the appellant through his cautioned statement, D66 is irrelevant and of no consequence.

[38] Further, it matters not whether Solomon is the real trafficker, as it was the appellant who was in possession of the drugs. It is also of no consequence whether the investigating officer failed to investigate Solomon or his phone numbers.

[39] The learned JC and the Court of Appeal did not err, and both tiers found that the appellant failed to raise a reasonable doubt upon the finding that the appellant had possession of the said drugs. There are overwhelming evidence to support the offence of possession under the DDA.

[40] Therefore, given the aforesaid, as the learned JC had misdirected himself by way of non-direction when he failed in making a finding as to which presumption he was relying on, we set aside the conviction and the sentence by the learned JC and the Court of Appeal and substitute it with a conviction under s 12(2) of the DDA and punishable under s 39A(2) of the same.

[41] We shall hear mitigation from the appellant before sentencing.

[42] In mitigation learned counsel for the appellant states that the appellant is 63 years old, has a sick wife and an 80 year old mother in Peru. He has not been in contact with his family ever since his arrest in Malaysia. He therefore pleaded for leniency from this honourable court in imposing the imprisonment sentence from the date of his arrest as his only wish is for him to return home to be with his family.

[43] The learned deputy public prosecutor urged this court to impose a deterrent sentence between 18–25 years of imprisonment considering the amount of drugs that he was caught with, and the maximum sentence is life imprisonment and a mandatory ten strokes of whipping under the provision.

[44] After considering the submissions and mitigation from both sides, and the facts of the present case, we are of the view that an appropriate sentence of ten years would serve its purpose. Accordingly we sentence the appellant to ten years imprisonment from the date of arrest. Due to the appellant's age the mandatory whipping sentence under the said provision, is not applicable on him.

Conviction and sentence for trafficking set aside, appellant convicted under s 12(2) of the DDA and sentenced to ten years' jail.

Reported by Ashok Kumar